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IN THE COURT OF APPEALS OF INDIANA

TRISTAN BOWLING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A02-0611-CR-1017
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey R. Heffelfinger, Judge
Cause No. 35C01-0511-FA-80

March 1, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Tristan Bowling appeals his maximum sentence of fifty years for Neglect of a Dependent as a Class A felony.[1] Specifically, Bowling contends that the trial court gave undue weight to his criminal history and overlooked several mitigators and that his sentence is inappropriate. Concluding that the trial court did not abuse its discretion in according significant weight to Bowling's criminal history and in not finding any mitigators and that the sentence is not inappropriate in light of the nature of the offense and Bowling's character, we affirm.

Facts and Procedural History

On May 15, 2006, Bowling pled guilty to Neglect of a Dependent as a Class A felony, with sentencing left to the discretion of the trial court. In exchange, the State dismissed a habitual offender allegation as well as theft and burglary charges that were pending in another case. The facts relevant to the neglect of a dependent charge, as recited by the State and agreed to by Bowling at the guilty plea hearing, are as follows:

> On Tuesday, February 8th, 2005, . . . Jessica Bowling and the Defendant were living at 723 Grayston Avenue, in Huntington County, Indiana, with their (2) two daughters [C.B.] and [K.B.] At the time [C.B.] was two (2) years and [K.B.] was almost two (2) months old. . . .
>
> [T]he Defendant and [his sister] Carlene were gone for about two (2) hours and the Defendant's wife, Jessica Bowling, stayed at their home with both of their daughters. When Carlene and the Defendant returned to the home the Defendant could hear [K.B.] . . ., the two (2) month old crying from outside. When the Defendant went into the home, Jessica was throwing things and shouting profanities about how she was sick of [K.B.] crying and [was] exhausted from not getting enough sleep. Jessica handed

[1] Ind. Code § 35-46-1-4(b)(3).

> [K.B.] to Carlene, . . . the Defendant's sister, who stayed and calmed [K.B.] down.
>
> From that point forward [K.B.] began sleeping a lot and when she woke up she would make a half-whine, half-howl sound instead of crying. During Tuesday night into the early morning hours Wednesday, [K.B.] ate about one-third (1/3) of what she normally ate.
>
> On Wednesday, February 9th, 2005, [K.B.] slept for twenty-one (21) of twenty-four (24) hours and she did not wake to eat.
>
> [K.B.] woke up briefly Thursday morning, February 10th, ate very little and then slept the entire day. Later Thursday evening the Defendant noticed that [K.B.] was gasping for breath. He picked [K.B.] up and she was limp and unconscious.
>
> During Tuesday, Wednesday and Thursday the Defendant admits that both he and his wife Jessica failed to take [K.B.] to get any kind of medical care. It was only Thursday night after [K.B.] was gasping for breath and limp that Jessica and the Defendant took her to the hospital.
>
> The Defendant admits that by failing to take [K.B.] sooner to get medical treatment he placed her in a situation that endangered her life or health and this resulted in [K.B.]'s death on February 13th, 2005.

Tr. p. 24-26. Finding one aggravator, Bowling's criminal history, and no mitigators, the trial court sentenced Bowling to the maximum term of fifty years. This appeal ensued.

Discussion and Decision

I. Aggravators and Mitigators

Bowling contends that the trial court erred by sentencing him to the maximum term for a Class A felony. At the time of Bowling's offense, Indiana Code § 35-50-2-4 provided in relevant part: "A person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for

aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances."[2]

In general, sentencing determinations are within the trial court's discretion. *Cotto v. State*, 829 N.E.2d 520, 523 (Ind. 2005) (citing *Wooley v. State*, 716 N.E.2d 919, 929 (Ind. 1999), *reh'g denied*). If the trial court relies upon aggravating or mitigating circumstances to enhance or reduce a presumptive sentence, it must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances. *Wooley*, 716 N.E.2d at 929.

Here, the trial court enhanced Bowling's sentence upon finding one aggravator, his criminal history, and no mitigators. Bowling first argues that the trial court gave undue weight to his prior criminal history, which consists of eight felonies and numerous misdemeanors. Specifically, he claims that none of the offenses are violent or involve a child. In *Morgan v. State*, 829 N.E.2d 12, 15 (Ind. 2005), the Indiana Supreme Court stated that the weight of a defendant's criminal history is measured "by the number of prior convictions and their seriousness, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." While acknowledging that, in many instances, "a single aggravator is sufficient to support an enhanced sentence," the *Morgan* Court cautioned

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[2] Effective April 25, 2005, the Indiana General Assembly amended Indiana's sentencing statutes, including Indiana Code § 35-50-2-4. In particular, the amendment eliminates presumptive sentences and fixed terms in favor of an advisory sentencing scheme. We will examine the propriety of Bowling's sentence under the former statute, which was in effect at the time of the offense.

sentencing and appellate judges to think about the appropriate weight to give a history of prior convictions. *Id.* The *Morgan* Court noted that the defendant's prior Class B felony conviction for delivering a controlled substance was certainly worthy of some weight because of its similarity and proximity to the offense at issue, i.e., possession of methamphetamine as a Class A felony. *Id.* at 16. However, in light of the five mitigating factors found by the trial court, the *Morgan* Court determined that the defendant's criminal record, standing on its own, would not support the imposition of the enhanced sentence. *Id.*

Here, Bowling's prior felony convictions were in 1996 for theft, in 1998 for criminal mischief, in 2000 for possession of marijuana, and in 2002 for maintaining a common nuisance, possession of marijuana, and three counts of theft. He also has at least twenty-five misdemeanor convictions[3] and has violated both probation and parole on more than one occasion. Admittedly, the prior convictions bear no similarity to the present offense. Nevertheless, given that at the age of twenty-eight Bowling had amassed over thirty convictions and had violated both probation and parole in a ten-year period, Bowling's criminal record supports the maximum sentence in this case.

Bowling next argues that the trial court failed to identify the following mitigating circumstances: his decision to plead guilty, his remorse, and the hardship to his

[3] Both the State and Bowling state in their appellate briefs that Bowling has ten misdemeanor convictions. However, the Presentence Investigation Report lists twenty misdemeanor convictions for criminal mischief under one cause number alone. The trial court also mentions these convictions at the sentencing hearing. *See* Tr. p. 42. Although difficult to discern from the PSI, it appears that Bowling has thirteen additional misdemeanor convictions. These convictions are for crimes such as: conversion, possession of marijuana, false informing, driving while suspended, and reckless possession of paraphernalia.

dependents as a consequence of his incarceration. A trial court is not obligated to accord the same weight to a factor that the defendant considers mitigating or to find mitigators simply because they are urged by the defendant. *Klein v. State*, 698 N.E.2d 296, 300 (Ind. 1998). Rather, it is within the trial court's discretion to determine whether mitigating circumstances are significant and what weight to accord to the identified circumstances. *Kelly v. State*, 719 N.E.2d 391, 395 (Ind. 1999), *reh'g denied*. Moreover, the trial court is not required to explain why it did not find a certain factor to be significantly mitigating. *Dunlop v. State*, 724 N.E.2d 592, 594 (Ind. 2000), *reh'g denied*.

First, Bowling claims that the trial court should have given his guilty plea "some" mitigating weight. Appellant's Br. p. 11. In its sentencing order, the trial court stated, "the Court specifically rejects the fact that the Defendant ple[d] guilty as a mitigating factor in as much as the State dismissed several charges including an habitual offender count and also dismissed a separate burglary and theft case that was pending against the Defendant." Appellant's App. p. 3-4. "A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and extends a benefit to the State and to the victim or the victim's family by avoiding a full-blown trial." *Francis v. State*, 817 N.E.2d 235, 237-38 (Ind. 2004). "[A] defendant who willingly enters a plea of guilty has extended a substantial benefit to the [S]tate and deserves to have a substantial benefit extended to him in return." *Id.* at 237 (quoting *Scheckel v. State*, 655 N.E.2d 506, 511 (Ind. 1995)). However, a trial court does not abuse its discretion by not finding a guilty plea as a mitigating factor when a defendant receives a substantial benefit for pleading

guilty. *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999); *see also Francis*, 817 N.E.2d at 238 n.3.

As the trial court noted, the record reveals that a charge of theft, a charge of burglary, and a habitual offender allegation against Bowling were dismissed in exchange for his plea of guilty to neglect of a dependent. Because Bowling received a substantial benefit from his decision to plead guilty, the trial court did not abuse its discretion by failing to give his guilty plea any mitigating weight.

Next, Bowling claims the trial court should have considered his remorse as a mitigator. At the sentencing hearing, Bowling testified, among other things, that he "made a terrible mistake" and had "a lot of remorse for [his] actions." Tr. p. 34. The trial court heard this testimony but declined to find Bowling's alleged remorse as a mitigator. The Indiana Supreme Court has stated that the trial court's determination regarding remorse is similar to a determination of credibility. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002). In the absence of evidence of some impermissible consideration by the trial court, we accept its determination of credibility. *Id*. We find no impermissible considerations. The trial court did not abuse its discretion in failing to consider this mitigator.

Last, Bowling claims that the trial court failed to identify as a mitigator the undue hardship that his incarceration would create for his children. The record discloses that Bowling has three children other than the deceased. At the time the PSI was compiled, he owed past due child support of at least $10,000.00. Thus, his claim that his children will suffer additional economic deprivation from his incarceration is highly disputable.

Moreover, our Supreme Court has stated, "[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). In addition, jail is always a hardship on dependents, and Bowling fails to explain how his fifty-year sentence is more of a hardship on his children than would be the presumptive thirty-year sentence. *Vazquez v. State*, 839 N.E.2d 1229, 1234 (Ind. Ct. App. 2005), *trans. denied*. As such, the trial court did not abuse its discretion in failing to identify this as a mitigator.

In sum, the trial court properly found one aggravator, Bowling's criminal history, and no mitigators. Given the significance of Bowling's criminal history, the trial court did not abuse its discretion in sentencing Bowling to the maximum term of fifty years.

II. Appropriateness of Sentence

Next, Bowling contends that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B), which provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Regarding the nature of the offense, we acknowledge that the offense is an act of omission rather than an act of commission. That is, the State has never alleged that Bowling perpetrated C.B.'s fatal injuries or was specifically aware that his wife had done so. Rather, the State alleged, and Bowling admitted, that he failed to seek medical attention for C.B. after the infant cried in an unusual manner, failed to eat properly, and slept for most of two days. However, C.B. was only *two months old* and relied entirely

upon Bowling and his wife for her survival. Moreover, Bowling's failure to seek medical attention contributed to her death.

With regard to Bowling's character, it is apparent that his numerous previous attempts at rehabilitation have failed to deter him from criminal activities. His criminal history is extensive, including eight felonies and over twenty misdemeanors. His criminal activity resulted in the revocation of both probation and parole. In addition, Bowling has a child support arrearage of at least $10,000.00. In light of the nature of the offense and his character, we conclude that Bowling's fifty-year sentence is not inappropriate.

Affirmed.

BARNES, J., concurs.

BAILEY, J., dissents with separate opinion.

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	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A02-0611-CR-1017
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

BAILEY, Judge, dissenting

I respectfully dissent from the affirmation of Bowling's fifty-year sentence, the maximum possible for a Class A felony conviction, because the nature of the offense and the character of the offender dictate a sentence below the maximum.

First, the nature of Bowling's offense is that of omission rather than commission. In the absence of a causal nexus between Bowling's omission and K.B.'s death, I find it necessary to question the adequacy of the factual basis to support the offense to which Bowling pleaded guilty. The State charged that Bowling "intentionally placed [K.B.] in a situation that endangered her life or health and resulted in the death of [K.B.]" (App. 35.)

The State has never alleged, or attempted to demonstrate, that Bowling perpetrated K.B.'s fatal injuries or was specifically aware that his wife had done so.

The State alleged, and Bowling admitted, that he failed to seek medical attention for K.B. after the infant cried in an unusual manner, failed to eat properly, and slept for most of two days. Bowling offered his admission as a layperson that his failure to seek medical attention contributed to K.B.'s death. However, the State did not present any expert medical testimony or even a medical record. Thus, we have the bald assertion of Bowling as the sole uncorroborated evidence to establish that his omission contributed to K.B.'s death. Causation of death is normally established by expert medical testimony. On the bare record before us, I cannot conclude whether or not K.B.'s death was inevitable after the infliction of the fatal injuries. I cannot discern what medical assistance, if any, would have saved or prolonged K.B.'s life. As such, I am not convinced that Bowling's omission "resulted" in K.B.'s death, as required for conviction of Neglect of a Dependent as a Class A felony. See Ind. Code § 35-46-1-4(b).

In my view, the State would more properly have charged Bowling with Neglect of a Dependent as a Class D felony. See Ind. Code § 35-46-1-4(a). Bowling chose to plead guilty to an elevated offense where the State may have lacked proof to support the elevation (no doubt motivated by the promise of having unrelated Burglary and Theft charges dismissed). Certainly, his conduct of omission does not place him among the worst of the offenders within the category of the offense of Neglect of a Dependent as a Class A felony.

Turning to Bowling's character, it is undisputed that he has a criminal history. However, the Indiana Supreme Court has clarified that a criminal history is not an irrefutable aggravator. See Morgan v. State, 829 N.E.2d 12 (Ind. 2005). Rather, the Court recognized that "the question of whether the sentence should be enhanced and to what extent turns on the weight of an individual's criminal history." Id. at 15. Such "weight is measured by the number of prior convictions and their seriousness, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." Id.

Bowling has never been convicted of, or charged with, a crime of violence. His criminal history consists primarily of property crimes and possession of marijuana. In light of Bowling's six felony convictions, numerous misdemeanor convictions, and violation of probation and parole, some enhancement of the presumptive term is appropriate. However, I cannot agree with the trial court that Bowling's criminal history is such that he should receive a maximum sentence based solely upon that history.[1]

Too, it appears from the trial court's comments at sentencing that it may have considered (to Bowling's detriment) the dismissed charges of Burglary and Theft. However, an arrest is not equivalent to a criminal conviction. Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005). Alleged crimes do not directly support a sentence enhancement. See Lewis v. State, 759 N.E.2d 1077, 1084 (Ind. Ct. App. 2001), trans. denied. Rather, the court may properly find that no sentence mitigation is required to compensate for a

[1] I also find it noteworthy that the Probation Department, after logging Bowling's prolonged but non-violent criminal history, recommended a forty-year sentence.

guilty plea where the defendant already reaped a benefit by having charges dismissed. See Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999); Field v. State, 843 N.E.2d 1008, 1012 (Ind. Ct. App. 2006), trans. denied.

Bowling does not dispute his eligibility for a habitual offender enhancement. At first blush, it would appear that his plea agreement yielded him a significant benefit due to the dismissal of this allegation. However, had Bowling been convicted of a Class D felony, which the evidence would support, and adjudicated a habitual offender, he would have at most received a sentence of seven and one-half years (three years as a maximum sentence for the D felony and an enhancement of three times the presumptive (one and one-half-year) sentence for the D felony due to his habitual offender status). See Ind. Code § 35-50-2-7; Ind. Code § 35-50-2-8(h).

In light of Bowling's character, and the nature of this particular offense of Neglect of a Dependent, I would revise his sentence to thirty-five years.